**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400-N
Washington, D.C. 20001-8002

Date: April 22, 1999

Case No.: 1996-INA-0026

***In the Matter of:***

GEORGE BAKARALLI,
*Employer*

***On Behalf Of:***

SHAZIA BOODOOSINGH,
*Alien*

Certifying Officer: Delores Dehaan, Region II

Appearance: Peter J. Lorme, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

# DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

**Statement of the Case**

On March 24, 1994, George Bakaralli ("Employer") filed an application for labor certification to enable Shazia Boodoosingh ("Alien") to fill the position of Domestic Cook (AF 5). The job duties for the position are:

> Plan/cook/serve West Indian style meals in private home. Prepare all ingredients. Cook vegetables, meats, fish, and bake breads, pastries and cakes. Clean kitchen and all cooking equipment.

The requirements for the position are two years of experience in the job offered.

The CO issued a Notice of Findings on March 31, 1995 (AF 58-63), proposing to deny certification on the grounds that it does not appear that the duties of the position constitute full-time employment in violation of 20 C.F.R. § 656.50 (recodified as § 656.3). The Employer was requested to provide specific documentation that the position constitutes full-time employment. The CO additionally found that the requirement for experience in "West Indian" cooking is not normally required for this position in violation of § 656.21(b)(2). The Employer was requested to either delete the requirement and readvertise or rebut the finding by documenting the business necessity of the requirement. The CO also found that the Alien did not possess the required experience of two years of experience as a "Domestic Cook" in violation of § 656.21(b)(5), as her experience is working in a cafe. The Employer was requested to either reduce the requirements and readvertise, or submit evidence which documents that the Alien has the required experience. Moreover, the CO also found that the Employer rejected U.S. applicants Errol Charles, Yvonne Fraser, Euclid Peter Hines, and Bernice McKenzie, for other than lawful, job-related reasons in violation of § 656.21(b)(6). The Employer was requested to establish that these U.S. workers were unable to perform the duties of the position in a normally accepted manner by the nature of their training, education, experience, or a combination thereof.

In its rebuttal, dated May 19, 1995 (AF 64-84), the Employer contended that 12 meals will be prepared daily, and 60 meals will be prepared weekly for the four adults with differing and "erratic" schedules all living in the home, that there is no entertainment, laundry, child-care,

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

or other duties required of the position, and no domestic cook has ever been employed by the Employer previously. The Employer contended that "West Indian" cooking is a business necessity based on religious and ethnic traditions. The Employer stated that the Alien was formerly employed for seven years as a Domestic Cook in the home of a restaurant owner in Trinidad, but was not employed in his restaurant. The Employer contended that U.S. applicants Fraser, Charles, Hinds, and McKenzie were all rejected for lack of two years of experience as Domestic Cooks. The Employer further contended that no alternative experience was required, and experience preparing Haitian meals was not qualifying to prepare West Indian meals according to religious and ethnic traditions.

The CO issued the Final Determination on June 8, 1995 (AF 85-86), denying certification because the Employer failed to adequately document that the duties of the position constitute full-time employment. The CO found that the other findings had been satisfactorily addressed and were no longer at issue.[2]

On June 29, 1995, the Employer requested review of the denial of labor certification (AF 87-130). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

## Discussion

This matter falls squarely within our holding in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999)(*en banc*). Therefore, we hold as stated in *Uy* that:

> In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

*Carlos Uy* at 16.

## ORDER

The Certifying Officer's denial of labor certification is **VACATED**, and this matter is **REMANDED** for consideration in light of our decision in *Carlos Uy*.

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[2] The basis for this finding by the CO is not known as such does not appear consistent with the record before us. Clearly, the Employer did not require any special ethnic cooking experience, and yet rejected U.S. applicants who did not have West Indian cooking experience. Further, the record does not reflect that the Alien has any experience as a household cook. On remand, the CO is also directed to make specific findings on these issues, so that the decision can be reviewed.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.